

Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya

HIGH COURT (IPOH) — CRIMINAL APPEAL NO 52-8-1996
KANG HWEE GEE J
24 SEPTEMBER 1996

Criminal Procedure — Trial — Transfer of magistrate — Part-heard case — Exercise of discretion by succeeding magistrate to refuse application for trial de novo — Whether decision appealable — Criminal Procedure Code (FMS Cap 6) s 261

Evidence — Witness — Recalling of — Part-heard case continued before new magistrate — Whether witnesses in concluded voir dire may be resummoned and reheard — Criminal Procedure Code (FMS Cap 6) s 261(a)

Criminal Procedure — Trial — Trial within a trial — Trial within a trial completed — Whether doctrine of res judicata applies — Main trial later continued before new magistrate — Whether witnesses may be resummoned and reheard by new magistrate

The appellants appealed against the sessions court judge's exercise of his discretionary power under s 261 of the Criminal Procedure Code (FMS Cap 6) ('the Code') in ordering that the case against the appellants which was partly heard by the previous sessions court judge be continued by him from the point where it had been left, and not de novo. Both appellants were charged under the Prevention of Corruption Act 1961. The trial had reached a stage where the prosecution had called some 13 witnesses by the time the later judge took over the proceedings. The key witness, the complainant, had not finished giving his evidence. The appellants argued that: (i) the judge had wrongly exercised his discretion in not hearing the case de novo; and (ii) having decided not to do so, he committed further error in ruling that the appellants would not be allowed to demand that the witnesses in the earlier voir dire proceedings be resummoned and reheard, contrary to s 261(a) of the Code, which conferred such a right on the appellants.

Held, dismissing both appeals:

- (1) Although under s 307(i) of the Code the appellants may appeal against any judgment, sentence or order pronounced by the lower court, they could not do so against an order which is merely procedural in nature (see p 302E-F); *PP v Hoo Chang Chwen* [1962] MLJ 284 and *PP v RK Menon & Anor* [1978] 2 MLJ 152 followed.
- (2) The judge's exercise of discretion was procedural and his order a procedural decision and therefore not appealable. Such exercise, even if wrongful, could still be raised at the appeal of the case proper. Further, even if the appellants were convicted, irrespective of whether they appealed or not, the High Court may act under s 261(b) of the Code to set aside any conviction if it was of the opinion the appellants had been materially prejudiced (see

- A p 303F-G); *PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 distinguished.
- (3) Section 261 of the Code conferred on the judge a complete discretion. So long as he exercised that discretion judicially, according to rules of reason and justice and not according to private opinion, the High Court cannot interfere (see p 306B); *Oh Keng Seng v PP* [1976] 1 MLJ 143 distinguished.
- B (4) To hear the case de novo would not be the best course to adopt as the ability of the witnesses to recall events may have diminished with a lapse of six years. It would also unnecessarily prolong the trial and increase the expenses. The judge was also the best person to assess the direction the trial should take. Besides, the court should also take into account the full protection available to the appellants under s 261(a) and (b) of the Code (see p 306G-H); *Mohamed Idris bin Hj Mohamed Said v R* [1949] MLJ 31 not followed.
- C (5) The earlier judge had made a decision in the voir dire. To interpret s 261(a) of the Code without regard for the decision taken would run counter to the doctrine of res judicata. Although there is no direct precedent that it applies in a voir dire, as the decision in a voir dire is still one adjudicated upon authoritatively after hearing the parties, the principle should apply here as well
- D (see p 308A, F-G); *Sambasivam v PP* [1950] MLJ 145 followed.
- E

[Bahasa Malaysia summary]

- F Perayu-perayu membuat rayuan terhadap pelaksanaan kuasa budi bicara oleh hakim mahkamah sesyen di bawah s 261 Kanun Prosedur Jenayah (NMB Bab 6) ('Kanun tersebut') dalam membuat perintah bahawa kes terhadap perayu-perayu yang sebahagiannya telah didengar oleh hakim mahkamah sesyen sebelum ini diteruskan oleh beliau dari mana ia ditinggalkan, dan bukan secara de novo. Kedua-dua perayu telah dipertuduhkan di bawah Akta Pencegahan Rasuah 1961.
- G Perbicaraan telah mencapai tahap di mana pihak pendakwa telah memanggil kira-kira 13 saksi pada masa hakim yang kemudian mengambil alih prosiding. Saksi utama, iaitu pengadu, belum pun selesai memberi keterangan. Perayu-perayu berhujah bahawa: (i) hakim telah dengan salahnya melaksanakan budi bicara dalam tidak mendengar kes secara de novo; dan (ii) setelah membuat keputusan untuk tidak berbuat demikian, beliau telah melakukan kesilapan seterusnya dalam membuat keputusan bahawa perayu-perayu tidak akan dibenarkan menuntut supaya saksi-saksi dalam prosiding voir dire yang lebih awal diperintah untuk hadir di mahkamah dan didengar semula, bertentangan dengan s 261(a) Kanun tersebut, yang mengurniakan hak sedemikian ke atas perayu-perayu.
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- I

Diputuskan, menolak kedua-dua rayuan:

- (1) Sungguhpun di bawah s 307(i) Kanun tersebut perayu-perayu boleh membuat rayuan terhadap mana-mana penghakiman,

- hukuman atau perintah yang diumumkan oleh mahkamah rendah, mereka tidak boleh berbuat demikian terhadap suatu perintah yang bersifat prosedur semata-mata (lihat ms 302E-F); *PP v Hoo Chang Chwen* [1962] MLJ 284 dan *PP v RK Menon & Anor* [1978] 2 MLJ 152 diikuti. A
- (2) Pelaksanaan budi bicara oleh hakim adalah tentang prosedur dan perintah beliau suatu keputusan prosedur, dan oleh yang demikian tidak boleh dirayu. Pelaksanaan sedemikian, jikapun adalah salah, masih boleh dibangkitkan di rayuan kes yang sebenar. Selanjutnya, jikapun perayu-perayu disabit, tanpa mengira sama ada mereka merayu atau tidak, Mahkamah Tinggi boleh bertindak di bawah s 261(b) Kanun tersebut untuk mengetepikan apa-apa sabitan jika ianya berpendapat hak perayu-perayu telah dijejaskan secara material (lihat ms 303F-G); *PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 dibeza. B C
- (3) Seksyen 261 Kanun tersebut mengurniakan budi bicara yang sepenuhnya ke atas hakim. Asalkan beliau melaksanakan budi bicara itu secara adil, menurut rukun kemunasabahan dan keadilan dan bukannya menurut pendapat peribadi, Mahkamah Tinggi tidak boleh masuk campur (lihat ms 306B); *Oh Keng Seng v PP* [1976] 1 MLJ 143 dibeza. D
- (4) Perbicaraan kes secara de novo bukanlah jalan yang paling baik oleh kerana daya ingatan saksi-saksi mungkin telah luput dengan selang selama enam tahun. Ia juga akan memanjangkan perbicaraan dan menambahkan perbelanjaan. Hakim juga merupakan orang yang paling baik untuk menilai arah ke mana perbicaraan harus menuju. Di samping itu, mahkamah juga harus mengambil kira perlindungan penuh yang sedia ada kepada perayu-perayu di bawah s 261(a) dan (b) Kanun tersebut (lihat ms 306G-H); *Mohamed Idris bin Hj Mohamed Said v R* [1949] MLJ 31 tidak diikuti. E F
- (5) Hakim yang lebih awal telah pun membuat keputusan dalam voir dire. Tafsiran s 261(a) Kanun tersebut tanpa mengambil kira keputusan yang diambil akan melanggar doktrin res judicata. Walaupun tiada terdapat duluan langsung bahawa ianya terpakai dalam voir dire, oleh kerana keputusan dalam voir dire adalah suatu keputusan yang dihakimi secara autoritatif selepas mendengar pihak-pihak, prinsip ini juga harus terpakai di sini (lihat ms 308A, F-G); *Sambasivam v PP* [1950] MLJ 145 diikuti. G H

Notes

For cases on transfer of magistrate, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3170-3171.

For cases on recalling of witness, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1723-1730. I

For a case on trial within a trial, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3180.

A Cases referred to

- Mohamed Idris bin Hj Mohamed Said v R* [1949] MLJ 31
Oh Keng Seng v PP [1976] 1 MLJ 143
PP v Hoo Chang Chwen [1962] MLJ 284
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 436
B *PP v RK Menon & Anor* [1978] 2 MLJ 152
Sambasivam v PP [1950] MLJ 145

Legislation referred to

- Criminal Procedure Code (FMS Cap 6) ss 261, 307(i)
C Prevention of Corruption Act 1961 s 3(a)(ii), 4(a)

Hamid Sultan (Hamid Sultan & Rakan-Rakan) for the first appellant.
S Theivanthiran (Thevin Chandran & Wong) for the second appellant.
Ahmad Bache (Deputy Public Prosecutor, Anti-Corruption Agency) for the respondent.

D **Kang Hwee Gee J:** This was an appeal against the order of the learned sessions court judge at Ipoh in ordering that the case against the appellants which was partly heard by the previous sessions judge be continued by him from the point where it had been left by the previous sessions judge under s 261 of the Criminal Procedure Code (FMS Cap 6) ('the Code').

E The first appellant, Mohamed Anuardin bin Abdul Salem, was charged in the sessions court under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act') with the offence of corruptly receiving for himself two sums of money, RM3,500 in cash and RM8,000 in cheque, from one Lee Kaw as an inducement for the second appellant, Azizan bin Yahya (an Assistant Secretary, Immigration Unit of the Ministry of Home Affairs) to secure the approval for the renewal and return of the said Lee Kaw's passport.

F The second appellant, Azizan bin Yahya, was charged under the same section of the Act with the offence of abetting the offence of corruptly accepting the two sums from the first appellant for the same purpose as that in the first charge.

G In addition, the second appellant also faced a second charge under s 4(a) of the Act of corruptly receiving gratification for himself as an agent of the Government of Malaysia from Lee Kaw the sum of RM6,000 in cash, through one Doraisingam a/l Rengasamy as payment in relation to his principal's affairs, ie to obtain approval for the renewal and the return of a passport belonging to the said Lee Kaw.

H The offences were alleged to have been committed between the months of May and July 1990. The record shows that the trial was commenced on 14 September 1994 before sessions judge, En Mohd Zaki bin Md Yasin. Some 13 witnesses had already been called to give evidence for the prosecution.

I On 1 October 1995, before the hearing of the case could be completed, En Mohd Zaki had to go on transfer as the State Legal Adviser at Kedah.

His position at the sessions court was taken over by En Hassan bin Lah. When En Hassan sat on 25 March 1996, he decided to exercise the discretion open to him under s 261 of the Code to continue the case from where En Mohd Zaki had left. He overruled the objections of both counsel for the appellants that the proceedings be heard de novo. Hence this appeal.

The grounds of appeal

Both the appellants' complaints in this appeal appear to be similar. They could be condensed into the following two short statements:

- (i) the sessions judge had wrongly exercised his discretion in not hearing the case de novo in the circumstances of this case; and
- (ii) having decided not to hear the case de novo, he fell into further error in ruling that the appellants would not be allowed to demand that the witnesses in respect of those called in the voir dire proceedings be resummoned and reheard, contrary to the provision of s 261(a) of the Code which confers upon the appellants such a right.

A preliminary point: is the order appealable?

Under s 307(i) of the Code, any person who is dissatisfied with any judgment, sentence or order pronounced by the lower court may prefer an appeal in respect of any error of law or fact in a criminal case or matter.

It is trite law that any order so pronounced by a subordinate court which is merely procedural in nature is not appealable under s 307(i). Thus in *PP v RK Menon & Anor* [1978] 2 MLJ 152, it was held that an appeal did not lie against the decision of the president of the sessions court made in the course of a trial wherein he had overruled the objection of the appellants' counsel that the prosecution had not complied with the requirement of s 129(i)(b) of the Code which counsel submitted was the prerequisite to the commencement of proceedings against the appellants in that case. It was held that the ruling made by the learned president of the sessions court was merely a procedural ruling and was not appealable. A procedural ruling, it was held, was not a judgment, sentence or order within the meaning of s 307(i) of the Code. In so holding, the court followed the earlier case of *PP v Hoo Chang Chwen* [1962] MLJ 284. In that case, Rose CJ held that a ruling of the magistrate that a statement applied for by the defence was a first information report — and not a statement made in the course of police investigation (and must therefore be supplied to the defence) — was merely a procedural ruling. It was held (at the same page) that to allow such an appeal on the ruling would:

... open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.

In *PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436, one of the questions the (then) Supreme Court had to decide (on a reference on issues of law of public interest) was whether an appeal lay to the High

A Court from an order made by a subordinate court ordering the prosecution to supply photocopies of documents to the defence before the trial under s 51 of the Code. It was held (Hashim Yeop A Sani SCJ delivering the judgment of the court) that:

B The word 'order' is preceded by the words 'judgment' and 'sentence'. The order must therefore be a final order in the sense that it is final in its effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. See some discussion on this point in *Mohamed Amin Bros v Government of India* AIR 1950 FC 77 in respect of civil suits. The right of a person to ask for a document or other material in a criminal proceeding under s 51 is a right exercisable at the discretion of the court. Thus a decision or order to issue a summons under s 51 of the Criminal Procedure Code is a final order in the sense that it is final in its effect and therefore appealable under s 307(i) of the Criminal Procedure Code. It is distinguishable from a purely 'procedural' ruling as described in *PP v Hoo Chang Chwen* [1962] MLJ 283 and *PP v RK Menon & Anor* [1978] 2 MLJ 152. In the former case, Rose CJ of Singapore dealt with an appeal on the admissibility of certain statements and the learned judge held that the ruling of the magistrate was a procedural ruling and therefore not an appealable order. In the latter case, Ajaib Singh J also took the view that a ruling on a point of law relating to non-compliance with s 129(i)(b) of the Criminal Procedure Code was a procedural and non-appealable ruling.

E *Raymond Chia's* case was cited by counsel for the second appellant, En Thevin, who sought to justify the legality of this appeal on the principle enunciated in that case that the order of the sessions judge was final in its effect, in the sense that the trial would have to proceed on the format set by the sessions court judge.

F In my judgment, the order of the sessions judge in the instant case could not be a final order as any exercise of his discretion, even if wrongful, could still be raised at the appeal of the case proper. Further, even if the appellants are convicted, irrespective of whether they appeal or not, the High Court may act under s 261(b) of the Code to set aside any conviction if it is of the opinion that the appellants have been materially prejudiced by the fact that the conviction was on evidence not wholly recorded by the judge who convicted them.

G *Raymond Chia* can be readily distinguished. In that case, an application was made at the pre-trial stage to the sessions court to compel the prosecution to allow the appellants to take photocopies of documents they required for their defence. The order made by the court to disallow the application must therefore be a final order as the defence would have to proceed with the trial without those documents. Unlike the situation in the instant case, the only recourse they had was to appeal against the order. They would not be in a position to raise as a ground of appeal later when the substantive appeal is heard at the High Court that they had to conduct their defence without those documents.

I It is clear to me that the discretion exercised one way or another by a judge of the sessions court under s 261 of the Code to continue a case left uncompleted by his predecessor must be a procedural decision. An order made pursuant to that decision must therefore be a procedural order

which is not appealable under s 307(i) of the Code. The instant case is no exception. A

On that ground alone, the appeal would have to fail. But as there was no direct authority on this issue, for the sake of settling all questions relating to this appeal, I also proceeded to hear the parties on the merit on the assumption that the order was appealable. B

Whether sessions judge had rightly exercised his discretion

Section 261 of the Code provides that:

261 Change of Magistrate during hearing

Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial: C

Provided as follows: D

- (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and reheard;
- (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial. E

It would appear from the grounds of decision of the sessions court judge that the trial had reached a stage where the prosecution had called some 13 witnesses by the time he took over proceedings on 25 March 1996. The star witness in the case, the complainant, had not finished giving his evidence. The position taken by counsel for the second appellant, En Thevin, in his submission before me was that on account of the number of witnesses that had been called by the prosecution, the succeeding judge would not be in a position to fairly judge the case against the appellants as he had not seen and heard them in person as to be able to assess their demeanour. He relied on the judgment of Ajaib Singh J in *Oh Keng Seng v PP* [1976] 1 MLJ 143 wherein at pp 144–145 his Lordship, in deciding that the case should be continued by the succeeding president of sessions court de novo, justified his decision in the following words: F

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The provision in s 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a magistrate or president but I

A which is acted on by him may materially prejudice an accused person where
a decision involving the credibility of a witness is based on that evidence.
The provision however may generally be exercised where the evidence to be
acted on is more or less formal or is largely uncontroversial and where the
credibility of any material witness is not involved. In the case of *Mohamed*
B *Idris bin Hj Mohamed Said v R* [1949] MLJ 31 the appellant was convicted
by a magistrate on evidence partly recorded by him and partly by his
predecessor. The witness whose evidence was acted on by the succeeding
magistrate was a crucial witness and there was nothing to prevent this
witness from giving evidence if there had been a trial de novo. In ordering
a new trial Murray-Aynsley CJ referring to s 254 of the Straits Settlement
Criminal Procedure Code (which is in pari materia with s 261 of our Code)
C said that:

‘The power given under the section is of value, particularly when it is
used for evidence of a more or less formal character, or where the
witness cannot be produced. In the present case the witness whose
evidence was so acted on was a crucial one, and I cannot think that a
decision can be rewarded as satisfactory where it is based on evidence
D given before another magistrate, particularly when there is nothing to
prevent the witness from giving evidence on the further hearing.’

In pointing out what he described as the danger of acting under s 261 of the
Criminal Procedure Code Hashim J in the case of *Teay Wah Cheong v PP*
[1964] MLJ 21 said that (at p 22):

‘Unless it would cause hardship and great inconvenience to the accused
E person and witnesses I think it is much better for a president or a
magistrate to hear the case ab initio rather than take over the recording
of evidence from the other president or magistrate. For one thing, the
succeeding president or magistrate cannot assess the value of the evidence
recorded by his predecessor vis-a-vis the credibility of the witness.’

F The applicant is charged with uttering seditious words. By the very nature
of the charge the credibility of witnesses is bound to be of paramount
importance and I do not think that this is a proper case where the present
president of the sessions court may continue from where it was left by his
predecessor and act on the evidence already recorded. Furthermore, all the
13 prosecution witnesses are readily available to give evidence. The hearing
G by the previous president lasted only six days and I do not think that a new
trial will result in much loss of time and expense.

I must state here that I am in complete agreement with the decision of his
Lordship, in so far as he decided that in the circumstances of that case it
was more appropriate that the case be commenced de novo by the
succeeding president.

H However, it must be noted that in that case no decision was ever
made by the succeeding president of the sessions court one way or other
under s 261 of the Code. His Lordship had taken it upon himself to make
the order that the case be heard de novo in the course of exercising his
revisionary power to revise the order made by the preceding president,
I who had overruled the objection of counsel for the accused that he
disqualified himself from continuing to hear the case on account that there
may be a conflict of interest as he had already been transferred and taken
up the post of a deputy public prosecutor. In making that decision, his
Lordship did not have to rule whether the president of the sessions court

had exercised his discretion rightly under s 261 of the Code. The order he made was in fact his own order in the peculiarity of that case. A

In the instant case, however, I have to decide whether the discretion exercised by the sessions court judge was rightly exercised by him. I am bound by the fact that s 261 of the Code has conferred on him a complete discretion to decide one way or other; I am also bound by the principle that so long as he exercises that discretion judicially — that is to say, according to rules of reason and justice and not according to private opinion — I am in no position to interfere. B

In his ground of decision, the sessions court judge gave seven reasons why he had decided to continue the case from where his predecessor had left off which, for convenience, I will now reproduce verbatim: C

- (a) Pengadu dalam kes ini iaitu En Lee Kaw (SP7) belum lagi selesai memberi keterangan dalam pemeriksaan utama;
- (b) Pegawai penyiasat dalam kes ini belum lagi memberi keterangannya;
- (c) Ada di antara saksi-saksi yang telah dua kali selesai memberi keterangan kerana kes ini telah dua kali dibicarakan dan ramai daripada saksi-saksi tersebut datang dari Kuala Lumpur;
- (d) Perbicaraan kes ini telahpun dijalankan lebih kurang selama 30 hari;
- (e) Kes ini melibatkan kesalahan yang dilakukan dalam tahun 1990;
- (f) Ada terdapat beberapa bantahan berkaitan dengan persoalan undang-undang semasa perbicaraan dijalankan yang telahpun diputuskan oleh mahkamah; dan
- (g) Sekiranya kes ini didengar semula maka perbicaraan kes ini akan hanya dapat diselesaikan dalam tempoh yang lebih lama dan ini akan menyebabkan tekanan ke atas kedua-dua tertuduh dan saksi-saksi yang terlibat. D E F

The appellants were first charged at the sessions court on 24 December 1990 — some six years ago — but for reasons not entirely clear, were given a discharge not amounting to acquittal on 12 September 1994, after the prosecution had called three witnesses to give evidence. They were recharged with the same offence soon after which culminated in the present trial. To hear the case de novo would not be the best course to adopt as to a large extent, the ability of the witnesses to recall events may have diminished. Further, it would not be in the interests of justice to adopt that course as it would unnecessarily prolong the trial. I could not therefore find any flaw in the exercise of the sessions court judge's discretion which was not according to reason and justice that merits interference. The trial is being conducted in his court. He would be the person in the best position to assess the direction the trial should take. G H

En Thevin in his submission repeated that the opinion expressed by Murray-Aynsley CJ in *Mohamed Idris bin Hj Mohamed Said* [1949] MLJ 31 — as quoted by Ajaib Singh J in *Oh Keng Seng* — that the discretion not to continue the case de novo should be exercised only where witnesses of a more or less formal character have given evidence or where witnesses already called could not be produced and that a decision based on evidence recorded by another magistrate cannot be regarded as satisfactory. With respect, I must express my reservation on that decision. That case was I

- A decided in the late 1940s when cases heard by the courts were much fewer. Today, courts have by and large to deal with a greater number of cases of greater complexities. They have to be disposed of expeditiously with as few postponements as could be possibly avoided. Witnesses have to attend to their daily duties. Any repeated attendance in court would not be in their interest; less so if they are called and recalled to give the same evidence
- B over and over again. It is not uncommon for witnesses recalled to give evidence on the same facts to depart from the evidence they give on a previous occasion as their power of recall diminishes with time. Commencing a hearing *de novo* has the effect of not only prolonging a trial but also unnecessarily stretching the public purse.
- C In the light of the circumstances prevailing today, magistrates and sessions judges need not in my view restrict their consideration only to the opinion expressed by Murray-Aynsley CJ in *Mohamed Idris*, but should also consider these contemporary factors when exercising their discretion under s 261. The framers of the Code had the foresight to provide in s 261
- D itself the assurance that the legitimate right of the accused to a fair trial is protected which, unfortunately, was not highlighted by Murray-Aynsley CJ in his judgment. In the event that succeeding magistrate or sessions court judge decides to continue from where his predecessor left, the accused has two recourses. First, under s 261(a) the accused may demand that he be allowed to resummon and rehear any witnesses previously
- E called; second, after the trial he could still move the High Court to set aside his conviction under s 261(b) if he thinks that he has been materially prejudiced by the course taken by the magistrate or sessions court judge.

Whether witnesses in the voir dire could be resummoned and reheard

- F The ground of decision discloses that the previous judge of the sessions court had conducted two voir dire (trial within a trial) both at the instance of the prosecution to determine the admissibility of two cautioned statements recorded from the respective appellant. He had completed hearing the first; the second (in respect of the second appellant), however, was still in progress when he left. The present sessions court judge had ruled (despite
- G En Thevin's objection) that the first appellant would not be allowed to recall any of the witnesses in the first voir dire on the ground that the said trial had terminated and a decision had already been made by the previous judge to admit the first appellant's cautioned statement.
- H Before me, En Thevin submitted that having decided to continue the hearing from where it was left by his predecessor, it was not open to the sessions court judge to decide not to allow the first appellant to resummon and rehear any of the witnesses in respect of the first voir dire as this would be contrary to the proviso of s 261(a). He was supported in his views by En Hamid, counsel for the first appellant, who put forth the same argument
- I by drawing on some Indian cases on the equivalent section of the Indian Criminal Procedure Code cited in *The Code of Criminal Procedure* by Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore (13th Ed) which, however, I do not consider relevant and will not therefore consider.

I must admit that En Thevin's proposition appears attractive. However, it lacks objectivity as it ignores the fact that a decision had

already been made in the trial within a trial. To interpret s 261(a) without regard for the decision already made in the voir dire would run counter to the doctrine of res judicata as it applies in criminal cases. In criminal practice, the doctrine encompasses the two principles of autrefois acquit and autrefois convict which are extraordinarily complex. But for the present purpose, it is only necessary to apply the doctrine in its general form that a matter is res judicata as between the parties to a particular case if it has been concluded by a judgment binding those parties in an earlier case (see Aronson Reaburn Weinberg *Litigation: Evidence & Procedure* (3rd Ed) (Butterworths) at 18.14). The doctrine is well stated in the Privy Council case of *Sambasivam v PP* [1950] MLJ 145 as quoted in Archbold, *Criminal Pleading Evidence and Practice* (41st Ed) at 4-109.

In that case, the appellant was acquitted in a previous trial on a charge of illegally carrying firearms under the Emergency Regulation 1948 reg 4(1). In a subsequent trial, he was charged with and convicted for another offence of being in possession of ammunition under reg 33. In this trial the prosecution had relied upon the same cautioned statement used in the previous trial to secure a conviction. In allowing the appeal and quashing the conviction, Lord MacDermott, delivering the opinion of the Privy Council, held (obiter) that:

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. *To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties for the adjudication.* (Emphasis added.)

The principle has been invariably applied in both criminal and in civil trials with equal force, although I could find no direct precedent that it applies in a voir dire. Essentially, a voir dire (popularly referred to as a trial within a trial) is a mini-trial within the main trial convened for the purpose of determining whether the prerequisite to the admissibility of a piece of evidence has been satisfied in order that it can be admitted as evidence. A decision in such a mini-trial is nonetheless a decision adjudicated upon authoritatively after hearing the parties. There is, therefore, no reason why the same principle should not apply to a voir dire. The differentiation becomes less obvious if one considers by analogy that in civil cases, it is not open to a party to demand before a succeeding judge that an interlocutory application which has been allowed or dismissed by a previous judge be reopened and readjudicated upon the former continuing the main hearing of the case whether de novo or from where it is left by the previous judge.

The sessions court judge was therefore right to disallow the first appeal to resummon and reexamine the witnesses in the voir dire.

Both the appeals are dismissed.

Appeals dismissed.

Reported by Tey Tsun Hang